Case Comments

The Right of an Indigent Defendant to an Interpreter in a Civil Trial: *Jara v. Municipal Court*

The gradual recognition of a constitutional right of indigent criminal defendants to the assistance of qualified interpreters at state expense has been the focus of much attention in recent years.[1] In *Jara v. Municipal Court,*[2] California became the first jurisdiction to address this issue in the context of a civil adjudication. Aurelio Jara, an indigent defendant who spoke little English, filed for a writ of mandamus after a municipal court judge denied his request for a court-appointed interpreter to assist him during trial. In a 4-3 decision, the California Supreme Court refused to provide Jara with an interpreter at state expense, rejecting his claim that denial of an interpreter would violate his constitutional rights to due process and equal protection of the laws. Though the majority addressed the due process issue only cursorily, completely omitting any discussion of equal protection, the dissenting justices, in a strong opinion by Justice Tobriner, indicated that they would uphold Jara's right to an interpreter on both grounds. The case provides an interesting vehicle to examine systematically the claim of an indigent civil defendant to a court-appointed interpreter according to the formulas, tests, and analytical methods by which questions of procedural due process and equal protection are traditionally resolved.

I. The Constitutional Doctrines of Due Process and Equal Protection

An examination of the development of the doctrines of procedural due process and equal protection provides a useful background to an analysis of the constitutional issues presented in *Jara.* This section will briefly review the analytical methods applied by the courts to determine the requisites of due process and equal protection and then explore in greater depth those components that lay the foundation for the recognition of a defendant's constitutional right to an interpreter in a civil action.

A. *Fundamentals of Due Process*

1. *The Search to Determine What Process is Due*

It is well established that the doctrine of procedural due process, imposed upon the federal and state judicial systems by the fifth[3] and

1. *See* Annot., 36 A.L.R. 3d 276 (1971).

2. 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), *cert. denied,* 99 S. Ct. 833 (1979).

3. The fifth amendment to the United States Constitution provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

fourteenth[4] amendments, requires, at a minimum, that "deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case."[5] The opportunity to be heard, revered as the fundamental requisite of due process of law,[6] must be granted at a meaningful time and in a meaningful manner.[7] Yet the identification of the procedural safeguards that comprise a meaningful opportunity to be heard requires an individual examination in each case, for the procedural requisites for the hearing vary with the subject matter and the necessities of the situation,[8] as well as with the characteristics and handicaps of the one who is entitled to such rights.[9]

In determining the procedural protections required by the due process clause, the United States Supreme Court has traditionally looked to established rules, principles, and modes of proceeding,[10] the dictates of natural law,[11] and the requirements of fundamental fairness.[12] A balancing approach, in which the interests of the state are weighed against the

4. The fourteenth amendment to the United States Constitution provides in part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ."

5. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

6. Grannis v. Ordean, 234 U.S. 385, 394 (1914).

7. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

8. Moyer v. Peabody, 212 U.S. 78, 84 (1909). *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). In *Boddie* the Court recognized:

> What the Constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner" (citation omitted) "for [a] hearing appropriate to the nature of the case." (citation omitted) The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.

The *Moyer* doctrine that constitutional due process requirements are dependent upon the circumstances of a particular case was recognized by the California Supreme Court in Sokol v. Public Utilities Commission, 65 Cal. 2d 247, 254, 418 P.2d 265, 270, 53 Cal. Rptr. 673, 678 (1966), a case concerning the right to a hearing prior to termination of telephone service for illegal activity, in which the court stated: "[The] content [of due process] is a function of many variables, including the nature of the right affected, the degree of danger caused by the proscribed condition or activity, and the availability of prompt remedial measures."

9. *See* Covey v. Town of Somers, 351 U.S. 141 (1956) (Since town officials knew that taxpayer was mentally incompetent and unable to understand the nature of the proceedings against her property, compliance with statutory notice procedures without the protection of a guardian does not afford notice to the incompetent, and a taking under such circumstances would be without due process of law.).

10. *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927); Pennoyer v. Neff, 95 U.S. 714, 733 (1878), *overruled on other grounds in* Shaffer v. Heitner, 433 U.S. 186 (1977) ("[Due process of law] mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.").

11. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 532 (1978). *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 106 (1908).

12. *See, e.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring); Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting), in which Justice Frankfurter writes:

> It is now the settled doctrine of this court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notion of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large, untechnical concept as "due process," the Court enforces those permanent and pervasive

individual interests sought to be protected, has long been utilized by the Court as a part of any determination of the form of hearing required in particular situations by procedural due process.[13] Professor Tribe has observed that it is only recently, however, that "overtly utilitarian interest-balancing has come to play a predominant role."[14] This trend culminated in the decision of *Mathews v. Eldridge,*[15] a case concerning the necessity of an evidentiary hearing prior to the termination of Social Security benefits, in which the United States Supreme Court was explicit in setting forth a general formula to be applied in determining what process is due:

> Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[16]

Expanding on the implementation of these factors, the Court noted that "[a]t some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[17] Following the *Eldridge* decision, the Court held in *Bounds v. Smith*[18] that while "the cost of protecting a constitutional right cannot justify its total denial,"[19] economic factors may be considered in choosing the methods to implement that right. Thus, the Court has indicated that considerations of cost will be a factor in deciding "exactly what level of protection a right should receive."[20]

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feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.

13. Board of Regents v. Roth, 408 U.S. 564, 570 (1972). *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

14. TRIBE, *supra* note 11, at 540.

15. 424 U.S. 319 (1976).

16. *Id.* at 334-35 (citations omitted). The factors listed were presented in the context of a determination of the constitutionality of administrative procedures. Nevertheless, there is nothing in the manner in which they have been presented which indicates that they are to be given such limited applicability, and in fact they are treated by two recent commentators as having a general application, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 502 (1978) [Hereinafter cited as NOWAK]; TRIBE, *supra* note 11, at 540. Certainly, their application has not been limited to factual patterns similar to *Eldridge*, for the *Eldridge* factors were subsequently applied in Ingraham v. Wright, 430 U.S. 651, 675 (1977), in which the Court held a child's due process liberty interest did not require the protection of notice and hearing prior to the imposition of corporal punishment by a teacher.

17. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

18. 430 U.S. 817 (1977).

19. *Id.* at 825.

20. TRIBE, *supra* note 11, at 541.

2. *Recognition of a Due Process Right to Cross-examine as an Element of a Meaningful Hearing*

Although the procedural requisites of a meaningful hearing vary according to the necessities of each individual case and the competing interests concerned, the importance of the right to cross-examine has increasingly been recognized as a fundamental safeguard and a basic element of a due process hearing. In *Greene v. McElroy,*[21] the United States Supreme Court observed:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.[22]

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21. 360 U.S. 474 (1959) (suit by an aeronautical engineer whose employment was terminated following a denial of his security clearance). The Court held that, absent explicit authorization from either the President or Congress, the Secretaries of the Armed Forces were not authorized to deprive the petitioner of his job in a proceeding in which he was not afforded the safeguard of confrontation and cross-examination.

22. *Id.* at 496-97. In reaching these conclusions, the Court found support in Professor Wigmore's observation that in Anglo-American law, confrontation and cross-examination are basic ingredients of a fair trial. 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1367 (3d ed. 1940). The Court quoted from Wigmore's text as follows:

> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

360 U.S. at 497. *Greene* and the cases discussed below pertaining to this topic deal with the right of cross-examination as a requirement of due process in the context of administrative hearings rather than civil trials. However, the requirement appears to be equally fundamental as an element of due process in the latter. While both criminal actions and administrative hearings of the nature discussed in the relevant cases share as a common element the fact that a governmental body is the opposing party, this does not appear central to the rationale of the *Greene* decision or the cases discussed below. Rather, the focus of these cases is on the fairness of the proceeding, requiring the most effective of procedural safeguards against false or perjured testimony that could cause serious injury to an individual. The Court's reliance upon Wigmore's recognition of confrontation and cross-examination as basic ingredients of a fair trial further supports this position.

Rather than suggesting the existence of a fundamental distinction which requires due process rights at a governmental administrative hearing that are not recognized at a civil trial, lack of authority recognizing a due process right to confrontation in a civil trial is most probably explained by the absence of the need to litigate the issue in the context of a civil trial, where the opportunity for cross-examination has long been provided. *See* 81 AM. JUR. 2d *Witnesses* §§ 464, 467 (1976). It has been only with the growth of modern bureaucracies and the increasing adjudicatory powers given to governmental agencies (a trend that has accompanied the recognition of new property rights, *see* Reich, *The New Property*, 73 YALE L.J. 733 (1964)) that the need has arisen to litigate so frequently the question of which of the procedural safeguards traditionally provided in judicial proceedings were required as elements of due process and therefore must similarly be provided in adjudications by administrative bodies. *See generally* Hannah v. Larche, 363 U.S. 420, 442 (1960), in which the United States Supreme Court stated:

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content

These findings were reaffirmed and quoted with approval in *Goldberg v. Kelly*,[23] a case in which the United States Supreme Court held that welfare recipients must be given an opportunity to confront and cross-examine the witnesses relied on by the department prior to termination of benefits. The Court found that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[24] Although, as with any due process safeguard, serious countervailing interests and consequences of adjudication that are not of great significance may dictate that in a given instance this right should be not implemented,[25] the right to confront and cross-examine adverse witnesses has continued to be recognized as a basic and minimum requirement of a due process hearing.[26]

3. *The Existence of a Due Process Right to Be Present*

It is generally recognized that a party to a civil action who is not in default is entitled to be present in the courtroom at all stages of his trial.[27] This right reaches constitutional dimensions both through the guarantees of the due process clause[28] and the right to trial by jury[29] secured by the seventh amendment to the United States Constitution[30] and by the state constitutions.[31] In the most recent case that deals with this issue,

varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

23. 397 U.S. 254, 270 (1970).

24. *Id.* at 269. Similarly, in Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), in which the Court held that Petitioner was denied procedural due process when he was denied admission to the bar without a hearing on the charges against him, it was recognized by the Court that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.

25. *See* Wolff v. McDonnell, 418 U.S. 539, 567 (1974) (in which the Court found that the heavy threat of havoc inside the prison and the special concerns of prison administration outweighed the interests of prisoners in being allowed cross-examination at their disciplinary hearings).

26. *See* Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972) (in which the Court held that the minimum requirements of due process at a parole revocation hearing included the right to confront and cross-examine adverse witnesses); 81 AM. JUR. 2d *Witnesses* § 464 (1976).

27. 75 AM. JUR. 2d *Trial* § 51 (1974). *See* Whaley v. State, 263 Ala. 191, 82 So. 2d 187 (1955); Willingham v. Willingham, 192 Ga. 405, 15 S.E.2d 514 (1941); Koeppel v. Koeppel, 208 S.W.2d 929 (Mo. App. 1948); Carlisle v. County of Nassau, 64 App. Div. 2d 15, 408 N.Y.S.2d 114 (1978); Leonard's of Plainfield v. Dybas, 130 N.J.L. 135, 31 A.2d 496 (1943); Harrington v. Decker, 134 Vt. 259, 356 A.2d 511 (1976).

28. Leonard's of Plainfield v. Dybas, 130 N.J.L. 135, 137-38, 31 A.2d 496, 497 (1943); Carlisle v. County of Nassau, 64 App. Div. 2d 15, 18 408 N.Y.S. 2d 114, 116 (1978).

29. Carlisle v. County of Nassau, 64 App. Div. 2d 15, 18-19, 408 N.Y.S.2d 114, 116 (1978 "[T]he fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury (citation omitted)."); Harrington v. Decker, 134 Vt. 259, 261, 356 A.2d 511, 512 (1976). Both of these cases involve the absence of a party during the selection of the jury.

30. The seventh amendment to the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

31. Carlisle v. County of Nassau, 64 App. Div. 2d 15, 18, 408 N.Y.S.2d 114, 116 (1978) ("Although the right to trial by jury contained in the Federal Constitution does not bind the states, or

Carlisle v. County of Nassau,[32] the New York Appellate Court found that the right of a party to be present at all stages of a trial is "basic to due process of law." The court in *Carlisle* explicitly recognized that this right is not forfeited when a party is represented by counsel.[33]

The California Supreme Court has also recently given some recognition to the right of a party to be present at trial in dicta in *Payne v. Superior Court of Los Angeles County*.[34] In determining the rights of a prisoner to attend a trial in which he is a civil defendant or to have appointed counsel or both, the court noted that one approach, to accord the prisoner the right of personal appearance to defend any action, and to employ counsel if able to do so, would place the indigent prisoner in the same position as the indigent free person.[35]

Although the right to be present has, as indicated above, gained substantial recognition, it has not received the widespread recognition and discussion in case law that other due process safeguards have invoked. Perhaps the reason for the absence of numerous cases defending the right of a party to be present in the courtroom results from an absence of the need to litigate the issue. Traditionally, civil trials in the United States are

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operate as a limitation upon them, similar provisions (as in the seventh amendment) are found in all state constitutions and all have the same purpose (citation omitted).").

32. 64 App. Div. 2d 15, 18, 408 N.Y.S.2d 114, 116 (1978).

33. The Court stated:

> The suggestion of defendant that a party somehow forfeits his constitutional right to be present at any and all stages of the trial when represented by counsel has no basis either in law or in logic. Waiver of the right to be present at a particular stage of the trial must be strictly construed (Arrington v. Robertson, 3 Cir., 114 F.2d 821). Although a party may not act in person at the trial of the action when represented by an attorney, except by consent of the court (CPLR 321, subd [a]), his right not only to be an interested and concerned observer of a proceeding which ultimately affects him, but to help plan and plot trial strategy is in no way denigrated by the presence of retained or assigned counsel. The attorney is not the alter ego of his client, but his representative or agent. As such he may not supplant the client either at his or the court's unbridled pleasure.

64 App. Div. 2d 15, 19, 408 N.Y.S. 2d 114, 117 (1978).

Carlisle, Leonard's of Plainfield, and AMERICAN JURISPRUDENCE rely in part on earlier federal cases, Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919), and Arrington v. Robertson, 114 F.2d 821 (3rd Cir. 1940). Both of these cases involve the absence of *both* the party and counsel at supplementary jury instructions, and thus their enunciation of a due process right to be present refers to the presence of parties and counsel in a manner that does not specifically identify the right of a party to be present as an independent right. *See* Arrington v. Robertson, *id.* at 823. In *Fillippon* the Supreme Court held:

> We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.

250 U.S. 76, 81 (1919). However, these cases give no indication of an intention to preclude the right of a party to be present due to the presence of his counsel, and in fact they are now cited in support of the proposition that a party is entitled to be present in the courtroom whether or not he is also represented by counsel. Carlisle v. County of Nassau, 64 App. Div. 2d 15, 19, 408 N.Y.S.2d 114, 116-17 (1978); 75 AM. JUR. 2d *Trial* § 51 (1974). Moreover, the weight of recent authority, *see* cases cited in note 27 *supra*, supports the right of a party to be present in addition to the presence of his counsel.

34. 17 Cal. 3d 908, 923, 553 P.2d 565, 576, 132 Cal. Rptr. 405, 416 (1976).

35. The court's final decision was to allow the prisoner the right to appointed counsel and the right to personal appearance only if the prisoner's testimony was necessary, a reversal of the position of the indigent free defendant. Here again the court's determination of the due process rights to be accorded an indigent prisoner result from a balancing process which takes into account the unique needs of the prisoner and the risks and added burden of allowing the prisoner to appear.

public, and parties normally encounter no impediment to their attendance in person, as well as through their counsel.[36] Justice Frankfurter's exposition on the nature of due process is worthy of note in this context: "Due process is that which comports with the deepest notions of what is fair and right and just. *The more fundamental the beliefs are the less likely they are to be explicitly stated.* But respect for them is of the very essence of [due process.]"[37]

The right of a party to be present in court throughout his civil trial is just such a right—a fundamental and basic tenet of due process, the denial of which would subvert the ideals of fairness and justice upon which the concept of due process rests.

4. *Due Process Right of Indigents to Access to Courts*

The seminal decision in the line of cases dealing with indigents' due process right to a meaningful hearing is *Boddie v. Connecticut.*[38] In *Boddie,* the United States Supreme Court held that due process prohibits a state from denying access to its courts to individuals seeking marital dissolutions solely because of their inability to pay court fees and service of process costs.[39] The *Boddie* Court refused to decide whether access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the due process clause.[40] It did, however, hold that the plaintiffs, who were left no alternative to the judicial system to alter a fundamental relationship, that is, marriage, were forced into the same position as defendants called upon to defend their interests in court.[41] Thus, the Court reasoned that the due process rights of plaintiffs in *Boddie* were to be "resolved in light of the principles enunciated in our due process decisions that delimit the rights of defendants compelled to litigate their differences in the judicial forum."[42] Relying in part on decisions such as *Windsor v. McVeigh*[43] and *Hovey v. Elliott*[44] that stand for the principle that "due process of law signifies a right to be heard in one's defense," the Court held that, at a minimum, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through

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36. 88 C.J.S. *Trial* § 40 (1955).

37. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (emphasis added).

38. 401 U.S. 371 (1971).

39. In reaching its decision, the Court utilized both the notions of fundamental fairness and a balancing test, holding that the "[s]tate owes to each individual that process which, in light of the values of a free society, can be characterized as due," *id.* at 380, but also recognizing that at a minimum due process required a meaningful opportunity to be heard, *absent a countervailing state interest. Id.* at 379. The Court assessed the interests put forth by the state for allowing the fee and cost requirement to bar indigents' access to the courts—the prevention of frivolous litigation, resource allocation, and cost recoupment—and determined that they did not justify the denial of access to the courts. *Id.* at 381-82.

40. *Id.* at 382.

41. *Id.* at 376-77.

42. *Id.* at 377.

43. 93 U.S. 274 (1876).

44. 167 U.S. 409 (1897).

the judicial process must be given a meaningful opportunity to be heard."[45] Moreover, the Court found that due process was not satisfied when a cost requirement, valid on its face, operated to "foreclose a particular party's opportunity to be heard."[46]

Underlying the Court's decision in *Boddie* was the basic notion that justice and social order cannot be maintained absent a legal system that guarantees that one may not be deprived of his rights, either liberty or property, without due process of law.[47] This belief prompted the Court's concern that denial of a defendant's full access to the judicial process raises grave questions regarding the legitimacy of the judicial system.[48]

Although the Supreme Court in two subsequent cases has refused to extend the *Boddie* right of access guarantee to indigent plaintiffs in other types of civil proceedings, the rationale of these later cases in no way diminishes the recognition made by the Supreme Court in *Boddie* of the right of indigent defendants to a meaningful hearing. In *United States v. Kras,*[49] the Court refused to extend the right of access to indigent plaintiffs seeking to file a petition in bankruptcy without prepayment of filing fees. The Court distinguished *Boddie* on the grounds that it recognized no fundamental interest in the availability of a discharge in bankruptcy and that alternative methods were available for the adjustment of a debtor's legal relationship with his creditors.[50] The Court acknowledged the recognition in *Boddie* of the rights guaranteed to civil defendants.[51] However, the availability of alternative remedies to plaintiff debtors seeking bankruptcy made it impossible for the Court to equate the position of such plaintiffs with the position of a civil defendant compelled to defend his interests in court.[52] In *Ortwein v. Schwab,*[53] the Supreme Court held that the Oregon appellate filing fee, as applied to indigents seeking to appeal an adverse welfare decision, was not violative of the due process clause. The Court again distinguished *Boddie* on the dual grounds that no fundamental interest would be gained or lost depending on the availability of the relief sought and that alternatives to the judicial remedy not conditioned on the payment of the fees existed. Both of these observations by the Court were grounded in its recognition that the appellants had already received a pretermination evidentiary hearing that met the minimal requirements of due process as recognized in *Goldberg.* The Court emphasized the fact that due process does not require the state to

45. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).
46. *Id.* at 380.
47. *Id.* at 374-75.
48. *Id.* at 376.
49. 409 U.S. 434 (1973).
50. *Id.* at 444-46.
51. *Id.* at 444.
52. *Id.* at 444-46.
53. 410 U.S. 656 (1973).

provide an appellate system.[54] Thus, the situation of appellants in *Ortwein* was equally dissimilar to that of a civil defendant who, prior to trial, has not yet been provided his "meaningful opportunity to be heard."[55]

The Supreme Court of California, which decided *Jara*, has itself recognized an indigent defendant's due process rights of access to the court and a meaningful opportunity to be heard in the recent case of *Payne v. Superior Court of Los Angeles*.[56] Noting that "[f]ew liberties in America have been more zealously guarded than the right to protect one's property in a court of law,"[57] Justice Mosk, writing for the majority, found that the right of an indigent prisoner, as a defendant in a civil case, to protect property he already owns or may own in the future, was equal in constitutional significance to the right that was protected in *Boddie*.[58] The Court in *Payne* therefore held that an indigent prisoner seeking to defend a civil suit has a due process right of access to the court that is violated when a prisoner is deprived of both the right to personal presence in the courtroom and appointed counsel.[59]

In summary, the doctrine of due process guarantees to civil defendants, at a minimum, a meaningful opportunity to be heard. In determining what procedural safeguards are necessary to comprise a meaningful hearing in a given situation, the courts have traditionally employed the concept of fundamental fairness as a basic component of their analysis. In addition, the courts have employed as a guide certain fundamental procedural protections that have been generally recognized as basic elements of a due process hearing, including the right to cross-examination and the right of a party to be present at the adjudication. A balancing approach, weighing the interests of the state against the individual interests sought to be protected, has also traditionally been

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54. *Id.* at 659-60.

55. The California Supreme Court in Payne v. Superior Court of Los Angeles, 17 Cal. 3d 908, 915, 553 P.2d 565, 571, 132 Cal. Rptr. 405, 411 (1976), explicitly recognized that the decisions of *Ortwein* and *Kras* did not alter the impact of *Boddie* on the rights of civil defendants. The California court noted that the later opinions were distinguished from *Boddie* on two grounds. First, the underlying interests the litigants were seeking were not as constitutionally significant as the dissolution of marriage. However, the *Payne* court concluded that a defendant in a civil case seeks not merely the benefit of a statutory expectancy, as the plaintiffs in *Kras* and *Ortwein*, but rather the protection of property he already owns or may own in the future. To illustrate this difference the California Supreme Court pointed out that "Congress could permissibly repeal all bankruptcy laws" and "a state legislature is under no constitutional mandate to provide welfare payments." Absent constitutional amendment, however, "neither Congress nor any state legislature could provide for extensive confiscation of private property without compensation." Thus, the California Supreme Court concluded that "the underlying right petitioner seeks to protect equals in constitutional significance the right to dissolve a marriage that was protected in *Boddie*. *Id.* at 916, 553 P.2d at 571, 132 Cal. Rptr. at 411. The second major distinction, that plaintiffs in *Kras* and *Ortwein* were not compelled to rely solely on the courts to pursue their interests, is easily distinguishable from the position of a civil defendant, who has no choice but to defend his interests in court. *Id.* at 916-17, 553 P.2d at 572, 132 Cal. Rptr. at 412.

56. *Id.* at 908, 553 P.2d at 565, 132 Cal. Rptr. at 405.

57. *Id.* at 911, 553 P.2d at 568, 132 Cal. Rptr. at 408.

58. *Id.* at 916, 553 P.2d at 571, 132 Cal. Rptr. at 411.

59. *Id.* at 923-24, 553 P.2d at 576, 132 Cal. Rptr. at 416. *See* note 35 *supra*.

utilized as part of a due process analysis. Moreover, the due process right of access to the courts, guaranteed in *Boddie*, ensures civil defendants that their right to a meaningful hearing cannot be denied solely because of their indigency.

B. *Development of Equal Protection Doctrine*

The promise of equal protection under the law, given independent constitutional significance with the adoption of the fourteenth amendment,[60] is a guarantee "that similar people will be dealt with in a similar manner"[61] by the government and that "people of different circumstances will not be treated as if they were the same."[62] Governmental classifications[63] challenged on equal protection grounds have traditionally been judged under two standards of review.[64] In the area of general social welfare and economic legislation, classifications are subject only to the rational relationship test,[65] which requires that a classification bear a rational relationship to a legitimate state interest.[66] A far more stringent standard, strict scrutiny, requires proof by the government that the

60. The fourteenth amendment provides in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Although the fourteenth amendment applies only to state and local governments, the United States Supreme Court has declared that classifications made by the federal government that would violate the equal protection clause will be held to contravene the due process clause of the fifth amendment. NOWAK, *supra* note 16, at 518. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975): "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' (citations omitted) This Court's approach to fifth amendment protection claims has always been precisely the same as to equal protection claims under the fourteenth amendment."

61. NOWAK, *supra* note 16, at 520, *citing* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

62. *Id.*

63. In order to challenge governmental action on equal protection grounds, one must first demonstrate that a law classifies persons in some manner. Commentators state that a classification within a law can be established in one of three ways: first, the law "on its face," or by its own terms may classify persons for different treatment; second, the law may classify in its application, *i.e.*, those governmental officials who are administering the law are applying it with different degrees of severity to different groups; and third, the law may be treated as if establishing a classification on its face if in reality it constitutes a device designed to impose different burdens on different classes of persons.

64. Although the United States Supreme Court has never recognized in a majority opinion the use of a standard of review other than the rational relationship and strict scrutiny tests, the Court has at times reviewed classifications based on gender and illegitimacy according to standards which fall between the two traditional tests, both in terms of the necessity of the government objective and in the strength of the required relationship between the classification and the government objective, leading many commentators to postulate the existence of an intermediate test. *See, e.g.*, NOWAK, *supra*, note 16, at 525-26; Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). An example of the application of the intermediate test can be seen in Craig v. Boren, 429 U.S. 190, 197 (1976), in which the court required that classifications by gender serve *important* government objectives which must be *substantially* related to achievement of those objectives. NOWAK, *supra* note 16, at 44-45 (Supp. 1978), suggests that the Court has recently used an intermediate test in the fields of alienage classifications, Foley v. Connelie, 98 S. Ct. 1067 (1978), and rights involving marriage. *See* Califano v. Jobst, 434 U.S. 47 (1977), and Zablocki v. Redhail, 434 U.S. 374 (1978).

65. NOWAK, *supra* note 16, at 524.

66. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). Other decisions have expressed the standard as requiring that the classification have some "reasonable basis." *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

classification is necessary to promote a compelling governmental interest.[67] Strict scrutiny is invoked to review classifications that are claimed to involve a "suspect" group[68] or that infringe upon a fundamental constitutional right.[69]

In determining whether a right is deemed fundamental for purposes of equal protection analysis, the answer lies in assessing whether the right is explicitly or implicitly guaranteed by the Constitution. The Supreme Court has warned that "[i]t is not the province of [the] Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[70] The Court's role in determining which rights are to be deemed fundamental is thus not to engage in a determination of the social or economic importance of a right or to weigh the relative importance of a right as compared with one deemed fundamental, but rather to protect from deprivation, infringement, or interference those fundamental personal rights or liberties[71] guaranteed explicitly or implicitly by the Constitution.[72]

The United States Supreme Court has not yet recognized those

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67. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

68. Graham v. Richardson, 403 U.S. 365, 372 (1971). Groups described as suspect have been characterized as those "discrete and insular minorit[ies] . . . for whom such heightened judicial solicitude is appropriate." *Id.* To date, the classifications that have been firmly established as inherently suspect by a majority of the United States Supreme Court are those based on race, nationality, and alienage. *Id.* Each such classification has been found to be based on an immutable characteristic that bears no relationship to ability to perform or contribute to society and relegates a class to inferior status. Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973). Commentators have observed, however, that a recent decision of the United States Supreme Court, Foley v. Connelie, 98 S. Ct. 1067 (1978), makes it clear that alienage classifications are not to be reviewed as strictly as the suspect classifications of race or national origin NOWAK, *supra* note 16, at 65 (Supp. 1978). The Court has repeatedly held that classifications based on wealth are not deemed suspect and will be reviewed only under the rational relationship test. Maher v. Roe, 432 U.S. 464, 471 (1977); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

69. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

70. *Id.* at 33. This statement reiterates the message of Justice Stewart in Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (Stewart, J., concurring):

> The Court today does *not* "pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . . ." To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands (emphasis in original).

71. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 38 (1973).

72. *Id.* at 33-34. In support of use of the strict scrutiny test to protect rights implicitly guaranteed by the Constitution, the Court cites Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972), acknowledging the dictum:

> [I]f we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold* [v. Connecticut, 381 U.S. 479 (1965)], the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest (emphasis in original).

Id. at 34 n.73.

The Court further observes, *id.* at 34 nn. 74, 75 & 76, that the constitutional underpinnings of rights to equal treatment in the voting process can no longer be doubted even though the right to vote in state elections is nowhere expressly mentioned, citing in support *inter alia* Bullock v. Carter, 405 U.S. 134, 140-44 (1972); Oregon v. Mitchell, 400 U.S. 112, 135, 138-44 (1970); and Kramer v. Union Free School District, 395 U.S. 621, 625-30 (1969); and that stricter standards of review are appropriately applied to ordinances affecting first amendment interests, Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972), and laws infringing upon the right of procreation, implicitly guaranteed by the Constitution as a right of personal privacy, Skinner v. Oklahoma, 316 U.S. 535 (1942).

procedural protections guaranteed by the due process clause in civil adjudications as fundamental rights in the context of an equal protection analysis.[73] While commentators suggest that a series of decisions related to the criminal justice system support the proposition that the Supreme Court has in essence recognized a "fundamental right" to fair treatment in criminal adjudications,[74] similar Supreme Court precedent based on equal protection doctrine is not available to support the arguments of those who call for recognition of a parallel fundamental right in the civil realm.[75] Nevertheless, the California Supreme Court has itself recently recognized that due process guarantees to civil defendants rise to the level of fundamental interests under an equal protection analysis. In *Payne v. Superior Court of Los Angeles County*,[76] the California Supreme Court held that "to be heard in court to defend one's property is a right of fundamental constitutional dimension; in order to justify granting the right to one group while denying it to another, the state must show a compelling state interest."[77] Thus, the court ruled that the denial of access to an indigent prisoner defendant constituted a prima facie equal protection violation under both the federal and state constitutions.

In addition to the question of which rights are deemed fundamental, the U.S. Supreme Court has focused in recent years on whether a classification does in fact significantly burden the exercise of a fundamental right and thus merit an increased standard of review. In *Maher v. Roe*,[78] the Court avoided the strict standard of review by

73. *See* note 185 *infra*.

74. Nowak, Rotunda and Young suggest that, while no single decision of the United States Supreme Court recognizes in a majority opinion a fundamental right to fair treatment in the criminal justice system for purposes of equal protection analysis, a series of related decisions, beginning with Griffin v. Illinois, 351 U.S. 12 (1956), have established such a fundamental right. NOWAK, *supra* note 16, at 676-80. *See, e.g.* Douglas v. California, 372 U.S. 353 (1963) (state cannot dismiss appeals of indigent criminal defendants with a separate system which did not include representation by counsel for defendants); Mayer v. Chicago, 404 U.S. 189 (1971) (*Griffin* rights to equal access to appellate review not limited to charges punishable by confinement). They suggest that while the Court "has not guaranteed that all defendants will be able to present their defense or prosecute their appeals with equal resources, . . . the Court has sought to guarantee a basic level of fair treatment as a fundamental constitutional right." NOWAK, *supra* note 16, at 678.

75. TRIBE, *supra* note 11, at 1008-10, recognizes that the Supreme Court's treatment of equal access to civil adjudication in *Boddie, Ortwein*, and *Kras* severely limits the extent to which equal access can be claimed as a fundamental right under equal protection analysis. He criticizes the Court's narrow approach and advocates the recognition of equal litigation opportunity as a fundamental right on the grounds that "the state's rules of contract, and its laws against forcible self-help, make judicial decision the only lawful mechanism for securing a binding determination against a recalcitrant opponent in *any* case." *Id.* (emphasis in original). This right, he maintains, should not be denied because of poverty to those who are obliged to rely upon such processes. Tribe's analysis, paralleling the access cases, focuses upon plaintiff's rights to access, since the Supreme Court has not yet dealt directly with the civil defendant's rights in an equal protection analysis.

76. 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

77. *Id.* at 919, 553 P.2d at 573, 132 Cal. Rptr. at 413.

78. 432 U.S. 464, 475 (1977). The Court in *Maher* recognized that the right to privacy included the right to have an abortion but held that a Connecticut law limiting medicaid payments for abortions to those "medically necessary" did not impinge upon the fundamental right and did not merit the strict standard of review. *Id.* at 471-74. Nowak, *et al.*, in analyzing the *Maher* opinion, find that the majority "views the duty of the state only in terms of inability to create barriers to the exercise of [fundamental]

distinguishing between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. More recently, the Court has observed that "reasonable regulations that do not significantly interfere with decisions to enter into [a fundamental] relationship may legitimately be imposed."[79]

A similar approach utilized by the California Supreme Court may explain its decision in *Castro v. State*.[80] The court reviewed under strict scrutiny a California constitutional provision that conditioned the fundamental right to vote upon the ability to read English. This restriction, as applied to those literate in another language and able to make a certain demonstration of access to sources of political information, was held unconstitutional under the equal protection clause of the fourteenth amendment. The court also held, however, that California was not required to adopt a bilingual electoral apparatus, determining that the state interest in maintaining a single language system was substantial and that such a bilingual system was not necessary in order for the Spanish-speaking voters to exercise their right to vote.[81] Thus, the court clearly reviewed the provision of a bilingual system under a less strict standard, apparently due to its determination that the right to vote would not be significantly infringed by the absence of such a system.

II. THE STATUS OF THE RIGHT TO AN INTERPRETER

The ability of a court to appoint an interpreter to translate the testimony of a witness when, in the discretion of the trial court, such a need arises, has long been recognized in this country, both in statutory[82] and

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rights. . . . [W]here the state controls the means necessary to the exercise of the right, or to their protection through litigation, the majority will engage in some redistribution of economic benefits by allowing indigent persons free access to those governmental 'benefits.' " However, the majority would not require the state "to equalize the ability to exercise fundamental rights in the private sector for persons of differing wealth classifications." The position of the dissent, as these commentators view it, is that "the state is not only required to respect the exercise of fundamental rights but also to facilitate their exercise within its existing wealth and income reallocation systems." NOWAK, *supra* note 16, at 622-23. Under either view, the *Maher* decision should not present an impediment to civil defendants seeking an interpreter on the basis of equal protection, for in this situation the state does control the means necessary to exercise due process rights in the courtroom.

79. Zablocki v. Redhail, 434 U.S. 374, 386 (1978). The Court cited as the basis of its observation its previous decision in Califano v. Jobst, 434 U.S. 47 (1977), in which the Court upheld the provisions of the Social Security Act that terminated certain benefits of a disabled person upon marriage.

80. 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

81. *Id.* at 242, 466 P.2d at 258, 85 Cal. Rptr. at 34. The court noted that it could reasonably be assumed that voters literate in Spanish could prepare themselves to vote through advance study of the sample ballots with the assistance of others capable of reading and translating them and that such voters would have access to the translations of ballot provisions and electoral commentary afforded by the Spanish news media.

82. *See* 28 U.S.C.A. §§ 1827, 1828 (West Supp. 1979). In addition, FED. R. CIV. P. 43 provides, in regard to the taking of testimony, that "[t]he court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

FED. R. CRIM. P. 28 similarly provides that "[t]he court may appoint an interpreter of its own

common law.[83] The right of a non-English-speaking party to the assistance of an interpreter throughout the course of a trial has been slower to gain recognition.

The recognition that has been given to the right of a party to the assistance of an interpreter during the entire course of trial has been largely limited to the criminal defendant. While there is no express right to an interpreter provided by the federal constitution, the recently enacted Court Interpreters Act[84] provides for the appointment of a certified interpreter at government expense when a defendant's inability to speak English inhibits his comprehension of the trial or his communication with his attorney or the judge. Rule 28 of the Federal Rules of Criminal Procedure similarly authorizes the court to appoint an interpreter to assist non-English-speaking defendants and to provide for the interpreter's compensation out of government funds.[85] Federal courts considering the matter in the criminal context have held that a denial of an interpreter to an indigent is a denial of due process and the defendant's sixth amendment right to cross-examination.[86] Those decisions holding that the trial court did not abuse its discretion or deny defendant his constitutional right in failing to appoint an interpreter are cases in which a determination was made that there was no need for such an appointment, as when the defendant was sufficiently fluent in English,[87] or an interpreter was present and available

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selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the Court may direct."

CAL. EVID. CODE § 752 (West 1966) provides as follows:

(a) When a witness is incapable of hearing or understanding the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he can understand and who can understand him shall be sworn to interpret for him.

(b) The interpreter may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

83. *See, e.g.*, People v. Holtzclaw, 76 Cal. App. 168, 171, 243 P. 894, 896 (1926), in which the court stated: "In every court there also rests the inherent power to call interpreters for witnesses under the proper circumstances, and it is, of course, the duty of a court to call an interpreter whenever such circumstances arise." *See also* Menella v. Metropolitan St. Ry. Co., 43 Misc. 5, 6, 86 N.Y.S. 930, 931 (1904); Wise v. Short, 181 N.C. 320, 322, 107 S.E. 134, 136 (1921).

84. 28 U.S.C.A. §§ 1827, 1828 (West Supp. 1979).

85. The Notes of the Advisory Committee on FED. R. CRIM. P. 28 provide in part:

This new subdivision authorizes the court to appoint and provide for the compensation of interpreters. General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English-speaking witnesses or to assist non-English-speaking defendants in understanding the proceedings or in communicating with assigned counsel.

86. United States v. Carrion, 488 F.2d 12 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974); United States *ex rel.* Negron v. New York, 434 F.2d 386 (2nd Cir. 1970). *See also* United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676 (E.D. Pa. 1973), in which, in addition to a discussion of the other constitutional problems, the court alludes to the infringement of the right to counsel when an interpreter is absent. *Id.* at 682.

87. Perovich v. United States, 205 U.S. 86 (1907); United States v. Barrios, 457 F.2d 680 (9th Cir. 1972); United States v. Smith, 464 F.2d 194 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972); United States v. Rodriguez, 424 F.2d 205 (4th Cir.), *cert. denied*, 400 U.S. 841 (1970); United States v. Sosa, 379 F.2d 525 (7th Cir.), *cert. denied*, 389 U.S. 845 (1967). *See also* Cervantes v. Cox, 350 F.2d 855 (10th Cir. 1965).

to defendant,[88] or the defendant could afford to provide himself with an interpreter.[89]

Similarly, the majority of the state courts that have considered the matter have recognized a state and/or federal constitutional right of a criminal defendant to the assistance of an interpreter at trial, based on notions of due process[90] and the right to confrontation.[91] Those decisions that fail to recognize such a right as constitutionally guaranteed are older cases in which the need for an interpreter was not clearly shown.[92] Such decisions explicitly affirm the principle that when the failure to provide a defendant an interpreter has hampered the defendant in presenting his defense, the court must find that he has been denied a fair and impartial trial. At least one state, New Mexico, has guaranteed in its constitution that an accused shall have the charge and testimony interpreted to him in a language that he understands.[93]

While much consideration has thus been given to the constitutional dimensions of the right of a criminal defendant to the assistance of an interpreter, the corresponding right of a civil defendant has received less attention from Congress and the courts. The Court Interpreters Act[94]

88. United States v. Valdivieso, 486 F.2d 545 (5th Cir. 1973), *cert. denied*, 416 U.S. 971 (1974); United States v. Diaz Berrios, 441 F.2d 1125 (2d Cir. 1971); Tapia-Corona v. United States, 369 F.2d 366 (9th Cir. 1966); Chavira Gonzales v. United States, 314 F.2d 750 (9th Cir. 1963).

89. United States v. Desist, 384 F.2d 889 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969).

90. State v. Rios, 112 Ariz. 143, 539 P.2d 900 (1975); State v. Natividad, 111 Ariz. 191, 526 P.2d 730 (1974); People v. Annett, 251 Cal. App. 2d 858, 861-62, 59 Cal. Rptr. 888, 890 (1967), *cert. denied*, 390 U.S. 1029 (1968) ("Failure of a trial court to appoint an interpreter for a defendant who has requested one, or whose conduct has made it obvious to the court that he is unable because of linguistic difficulties knowingly to participate in waiving his rights, is 'fundamentally unfair' and requires reversal of a conviction."); *In re* Mauriviov, 192 Cal. App. 2d 604, 13 Cal. Rptr. 466 (1961); State v. Faafiti, 54 Haw. 637, 638, 513 P.2d 697, 699 (1973) (court found no need for interpreter in particular case but stated: "It is general law that where a defendant cannot understand and speak English, the judge is required to appoint an interpreter to aid a defendant. Otherwise, a trial held in his presence would be meaningless to him and would violate our concept of due process, as he would not be given his day in court."); Parra v. Page, 430 P.2d 834 (Okla. Crim. App. 1967). *See Ex parte* Cannis, 83 Okla. Crim. 113, 173 P.2d 586 (1946).

91. Terry v. State, 21 Ala. App. 100, 105 So. 386 (1925) (court held Alabama constitutional right to confrontation would be meaningless to deaf-mute defendant unless the court provided the necessary means to communicate to accused the nature of the charge and testing of the witnesses); State v. Rios, 112 Ariz. 143, 539 P.2d 900 (1975); State v. Natividad, 111 Ariz. 191, 526 P.2d 730 (1974); Garcia v. State, 151 Tex. Crim. 593, 210 S.W.2d 574 (1948). *See* State v. Vasquez, 101 Utah 444, 121 P.2d 903 (1942).

92. Escobar v. State, 30 Ariz. 159, 245 P. 356 (1926) (court noted defendant's counsel understood testimony and presumed defendant's counsel would fulfill his duty to communicate the evidence to his client); Republic of Hawaii v. Yamane, 12 Haw. 189 (1899); The King v. Ah Har, 7 Haw. 319 (1888) (In both cases the Hawaiian court held that defendant had waived any right to an interpreter by failure to request one and that defendant's counsel could communicate the evidence to him); Zunago v. State, 63 Tex. Crim. 58, 138 S.W. 713 (1911) (defendant did not request interpreter until after testimony was in, but court held that if request had been timely made, the court would and should have appointed an interpreter); State v. Karumai, 101 Utah 592, 126 P.2d 1047 (1942) (defendant had free interpreter at last of two trials; no request for interpreter was made at first trial and defendant understood English fairly well). *See* Markiewicz v. State, 109 Neb. 514, 191 NW 648 (1922) (interpreter was present to assist defendant throughout trial). For a review of the cases dealing with the right to an interpreter in a criminal trial, see Annot. 36 A.L.R.3d 276 (1971).

93. N.M. CONST. art 2, § 14. *See* State v. Cabodi, 18 N.M. 513, 138 P. 262 (1914).

94. 28 U.S.C.A. §§ 1827, 1828 (West Supp. 1979).

provides for the appointment of interpreters in civil actions only when they are initiated by the United States. Furthermore, the Act provides that in civil actions the judge may, in his discretion, apportion the expense incident to providing the services of the interpreter between or among the parties or tax them as costs.

The only reported decision prior to *Jara* that confronts this problem is another California case, *Gardiana v. Small Claims Court*,[95] which considered the issue in the context of small claims proceedings. In *Gardiana* the appellate court affirmed the decision of a lower court holding that non-English-speaking litigants are entitled as a matter of right, free of charge, to be provided with a qualified interpreter.[96] The appellate court determined that when qualified volunteer interpreters are unavailable, a small claims court has inherent power to appoint an interpreter free of charge to non-English-speaking litigants. The court based its decision on the common-law principle that every court has the inherent power to appoint interpreters whenever such a course is necessary to the due administration of justice,[97] the statutory mandate of California Evidence Code section 752,[98] and basic notions of due process.[99] The appellate court limited the holding of the lower court only insofar as the court prohibited its application to nonindigents.[100]

III. FACTS AND HOLDING OF *Jara*

On February 14, 1974, Aurelio Jara was sued in the Municipal Court of San Antonio Judicial District by Le Roy Bell for $1,277.09 in property damages allegedly resulting from an automobile accident occurring on January 16, 1973. Jara sought assistance from the Southeast Legal Aid Center and an answer and cross-complaint were subsequently filed on his behalf.[101]

Jara spoke English slightly, but could communicate effectively only in Spanish. He supported himself, his wife, three children, and a mother-in-law on an income from wages totalling $530.00 per month.[102] Alleging indigency and his inability to speak or understand English, Jara filed a

95. 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1976).

96. *Id.*, at 421-25, 130 Cal. Rptr. at 680-83.

97. *Id.* at 423-24, 130 Cal. Rptr. at 682. *See* People v. Walker, 69 Cal. App. 475, 486, 231 P. 572, 577 (1924), in which the court noted that, in addition to power conferred by statute, courts of general jurisdiction had inherent power to swear interpreters, whenever necessary to due administration of justice, which might be exercised to supplement existing statutes, the provisions of which did not extend to all cases in which such a necessity appeared.

98. Gardiana v. Small Claims Court, 59 Cal. App. 3d 412, 423, 130 Cal. Rptr. 675, 681 (1976). *See* note 82 *supra*, CAL. EVID. CODE § 752 (West 1966).

99. Gardiana v. Small Claims Court, 59 Cal. App. 3d 412, 422-24, 130 Cal. Rptr. 675, 681-82 (1976).

100. *Id.* at 425, 130 Cal. Rptr. at 683.

101. Jara v. Municipal Court, 137 Cal. Rptr. 533, 534 (App. 1977), *rev'd*, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), *cert. denied*, 99 S. Ct. 833 (1979).

102. Brief for Appellant at 2, Jara v. Municipal Court, 137 Cal. Rptr. 533 (1977), *rev'd*, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), *cert. denied*, 99 S. Ct. 833 (1979).

motion requesting the court to appoint at state expense an interpreter to assist him in the upcoming trial. The municipal court denied this motion on the ground that the court had no inherent or statutory power to appoint an interpreter at the expense of Los Angeles County. Jara subsequently filed a writ of mandamus to compel the municipal court to provide the requested interpreter. The superior court denied the motion, concluding that Jara did not have a common-law right to an interpreter and that refusal to appoint an interpreter for an indigent litigant in a civil case did not constitute an abuse of discretion or a denial of either due process or equal protection.[103] This decision was reversed by the Court of Appeals, which held:

> [I]n a civil action, if the *defendant* is indigent and does not speak or understand English, and irrespective of whether he is, or is not, represented by counsel, and, if represented by counsel, irrespective of whether counsel speaks and understands English only, the due process and equal protection provisions of the federal and state Constitutions require, in order for such defendant to have meaningful opportunity to be heard and defend, that an interpreter be appointed for him at public expense.[104]

The California Supreme Court, over a strong dissent by Justice Tobriner, voted 4-3 to reverse the appellate court and to affirm the decision of the superior court denying Jara the assistance of a court appointed interpreter at the expense of the county. Justice Clark, writing for the majority, first determined that no statutory basis existed for appointment of an interpreter at public expense to assist non-English-speaking litigants.[105] The majority then concluded that there was no need for the court to exercise its inherent power by appointing interpreters at public expense because language assistance to indigent litigants represented by counsel appeared to be available.[106]

The court dismissed in cursory fashion the arguments that due process and equal protection require the appointment of interpreters at state expense for indigent civil defendants. The majority recognized that the right to a "meaningful opportunity to be heard" was guaranteed to indigent civil litigants by the United States Supreme Court in *Boddie*. They determined, however, that access to the court was not constitutionally impaired when an indigent had alternative means other than resort to the trial court to secure the relief sought.[107] Although no factual basis was

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103. Jara v. Municipal Court, 21 Cal. 3d 181, 183, 578 P.2d 94, 95, 145 Cal. Rptr. 847, 848 (1978), *cert. denied*, 99 S. Ct. 833 (1979); Jara v. Municipal Court, 137 Cal. Rptr. 533, 534 (App. 1977).

104. Jara v. Municipal Court, 137 Cal. Rptr. 533, 542 (App. 1977) (emphasis in original).

105. Jara v. Municipal Court, 21 Cal. 3d 181, 183, 578 P.2d 94, 95, 145 Cal. Rptr. 847, 848 (1978), *cert. denied*, 99 S. Ct. 833 (1979).

106. *Id.* at 184-85, 578 P.2d at 95-96, 145 Cal. Rptr. at 848-49. This article will not address the statutory issues presented by this case, nor will it examine the arguments presented by Jara dealing with the inherent power of the court, except as they may relate to the constitutional issues presented in the case. Both issues rely upon California statutory and common law and are therefore of less value in establishing general recognition of the right to an interpreter in a civil trial.

107. *Id.* at 186, 578 P.2d at 96-97, 145 Cal. Rptr. at 849-50.

given to support the conclusion,[108] the majority suggested that alternative means of obtaining language assistance is ordinarily available to the non-English-speaking litigants. The majority further concluded that because court proceedings are controlled by counsel, Jara was "in no worse position than the numerous represented litigants who elect not to be present in court at all."[109]

IV. THE CASE FOR RECOGNITION OF A CONSTITUTIONAL RIGHT OF AN INDIGENT CIVIL DEFENDANT TO THE ASSISTANCE OF AN INTERPRETER

A. *The Right of an Interpreter—A Requirement of Due Process*

It is now well established that, at a minimum, the doctrine of procedural due process guarantees a civil defendant a constitutional right to a meaningful opportunity to be heard—a right that cannot be denied a defendant solely on the basis of his indigency.[110] To decide whether procedural due process compels the provision of interpreters to indigent civil defendants at state expense, the basic issue that must be resolved is whether a meaningful opportunity to be heard is denied to a non-English-speaking defendant who is deprived of the right to the assistance of an interpreter at trial. The methods of analysis traditionally employed by the courts to determine the procedural safeguards necessary to comprise a meaningful hearing in a given situation afford an appropriate conceptual framework to resolve this question. Accordingly, a due process analysis of the right to an interpreter properly commences with an examination of the concept of fundamental fairness as it relates to the defendant's need for an interpreter. Such an analysis must also probe the relationship between the provision of an interpreter and those basic procedural safeguards most directly affected by the absence of such a protection—the right of cross-examination and the right of a party to be present. Finally, questions of

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108. *Id.* at 184-86, 578 P.2d at 95-97, 145 Cal. Rptr. at 848-50.

109. *Id.* at 186, 578 P.2d at 97, 145 Cal. Rptr. at 850.

110. Boddie v. Connecticut, 401 U.S. 371, 377 (1971). *See* notes 38-55 *supra* and accompanying text.

Many of the arguments presented throughout this article in support of the right of a civil defendant to an interpreter focus on the preservation of fairness, reliability and equality in the judicial process and, as such, would equally support recognition of the right of indigent civil plaintiffs to the services of an interpreter. While the author would advocate that these ideals, which lie at the core of due process and equal protection doctrine, would support the extension of this right to civil plaintiffs, that issue will not be addressed in this case comment for two reasons. First, the issue is somewhat outside the scope of the *Jara* decision. More important, however, is a desire to avoid the implication that the two issues are interchangeable, thereby leading a reader to believe that a defendant's right to an interpreter hinges on recognition of a similar right for plaintiffs. While the decisions of *Ortwein* and *Kras* indicate that an extension of current due process and equal protection doctrine is required for recognition of a constitutional right of plaintiffs to the assistance of interpreters, it is the author's position that current due process doctrine, especially in light of the recognition in *Boddie* of the rights of indigent defendants, requires no extension to sustain the right of an indigent defendant, who has no alternative to the judicial process, to an interpreter to assist him at trial. Moreover, the interests of plaintiffs, when weighed in the due process balancing test, may not counterbalance the interests of the state as decisively as do those of indigent civil defendants.

policy and the competing interests of the defendant and the state must be examined and weighed through application of the *Eldridge*[111] formula, a synthesis of the balancing approach traditionally employed by the courts in resolving procedural due process issues.

1. *Traditional Guarantees of Procedural Due Process*

a. *Fundamental Fairness*

The contrariety of the denial of an interpreter and the provision of a fair hearing has been fully recognized by those state and federal courts that have considered the right to an interpreter at state expense, both in civil and in criminal proceedings.

Reported judicial treatment of the issue in a civil context prior to *Jara* is limited to the decision of a California appellate court in *Gardiana v. Small Claims Court.*[112] Though the court in *Gardiana* did not rest its decision directly upon constitutional grounds,[113] its holding that an interpreter must be made available to indigent non-English-speaking defendants was based in part upon the belief that a contrary ruling "would have the 'practical effect of restricting an indigent's access to the courts because of his poverty [and would contravene] the *fundamental notions of equality and fairness* which since the earliest days of the common law have found expression in the right to proceed in *forma pauperis.*' "[114] The court identified as one of its major concerns the fact that to litigants "summoned to appear as defendants before a judicial tribunal whose proceedings are conducted in a language they can neither speak nor understand, these proceedings would be meaningless at best."[115] While the court in *Gardiana* examined the right to an interpreter in the context of a small claims proceeding, these broader concerns addressed by the court are equally applicable in a municipal court trial.[116] Although the presence of an

111. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

112. 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1976).

113. The appellate court in *Gardiana* grounded its decision upon a statutory interpretation of CAL. EVID. CODE § 752 (West 1966) that, if correct, would be germane only to the peculiar mode of proceedings in a small claims court, and upon the inherent power of the court to appoint an interpreter when necessary for the due administration of justice.

114. Gardiana v. Small Claims Court, 59 Cal. App. 3d 412, 424, 130 Cal. Rptr. 675, 682 (1976) (emphasis added), *citing* Isrin v. Superior Court, 63 Cal. 2d 153, 165, 403 P.2d 728, 736, 45 Cal. Rptr. 320, 328 (1965).

115. Gardiana v. Small Claims Court, 59 Cal. App. 3d 412, 423, 130 Cal. Rptr. 675, 681 (1976).

116. The majority in *Jara* briefly examined the *Gardiana* decision in the context of its discussion of the inherent power of the court, but determined that its precedential value was limited to small claims proceedings in which attorneys play no role. Jara v. Municipal Court, 21 Cal. 3d 181, 185, 578 P.2d 94, 96, 145 Cal. Rptr. 847, 849 (1978). While it is true that the absence of interpreters has a special significance in the operation of a small claims court, in which the parties must present their own defense, the concerns of the *Gardiana* court went beyond the mere ability of the court to function. As indicated above, the appellate court addressed broader concerns about the fairness of the proceedings and the meaninglessness of the proceedings to the non-English-speaking defendants, concerns that would not be completely remedied by the presence of an attorney. The expression of these broader concerns by the *Gardiana* court was ignored by the majority in *Jara.* Similarly, the majority in *Jara* failed to address the broader implications of its decision for unrepresented indigent defendants who, like small claims defendants, bear the entire burden of presenting their defense, but for whom the risk of potential loss may be far greater.

attorney provides added protection to a civil defendant, it will not alter his lack of comprehension.[117] Furthermore, viewing the issue in its broader perspective, it should be remembered that the right to an attorney for an indigent defendant in a civil trial has not yet been generally recognized.[118] Therefore, it is possible that civil defendants may find themselves in the same position as the defendant in a California small claims proceeding, confronted with total responsibility for presenting their own defense, but subject to far greater potential losses.

In criminal actions, many courts have explicitly recognized a constitutional right to the assistance of an interpreter predicated upon the guarantee of fundamental fairness afforded by the due process clause. In *United States ex rel Negron v. New York*,[119] the first federal case to recognize a constitutional duty on the part of the court to provide an indigent defendant with a qualified interpreter, this concern was vividly expressed:

> [A]s a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom, the state by its criminal processes chose to put in jeopardy.[120]

More recently, in *United States v. Carrion*,[121] the First Circuit expressed similar regard for the fairness of the proceedings: "The right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."[122] Many of the state courts that have recognized a constitutional right to an interpreter have similarly based their opinion, in whole or part, upon the due process guarantee of fundamental fairness.[123]

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117. Even if defendant's attorney is bilingual, she will rarely be able to provide her client with a simultaneous translation of the hearing and properly fulfill her normal courtroom duties. In State v. Rios, 112 Ariz. 143, 144, 539 P.2d 900, 901 (1975), the Supreme Court of Arizona recognized that even if the defense counsel spoke Spanish, the need for the assistance of an interpreter was not remedied:

> The fact that the defense counsel was able to speak Spanish does not negate the fact that the appellants were denied an interpreter. For defense counsel to cross-examine witnesses, listen attentively to testimony and objections of the prosecuting attorney and hear rulings and remarks of the presiding judge and simultaneously render an accurate and complete translation to his three clients is an impossible task.

See Chang & Araujo, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 CALIF. L. REV. 801, 822 (1975).

118. A constitutional right to appointed counsel has not yet been recognized by the Supreme Court. TRIBE, *supra* note 11, at 553. The author does not advocate that the right to an attorney should not be recognized in civil cases nor suggest that guaranteeing the right to an interpreter diminishes an indigent's need for an attorney. The point is merely that distinguishing *Gardiana* on the grounds that parties are unrepresented in small claims court may not be a valid distinction.

119. 434 F.2d 386 (2d Cir. 1970). The court in *Negron* stated as its primary focus the fact that "Negron's trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment." *Id.* at 389.

120. *Id.* at 390.

121. 488 F.2d 12 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974).

122. *Id.* at 14.

123. *See* note 90 *supra*.

Such concern for fundamental fairness and "simple humaneness" should not be limited to the realm of criminal adjudications. Though deprivation of life or liberty interests has received paramount consideration by the courts, substantial recognition has been given to the importance of protecting property interests with due process procedural safeguards.[124] Certainly, since potential property losses could cause serious deprivation to an indigent defendant and his family, an analogy to due process concerns for fairness in criminal adjudications is appropriate in examining the constitutional grounds supporting the right of an indigent civil defendant to an interpreter.[125] It is no less unjust to allow a civil defendant to sit uncomprehending through an entire trial while judge and jury decide how much of his meager income should go to right the wrong of which he is accused. Justice Tobriner perceived the gravity of the civil defendant's plight when, writing for the dissenting justices in *Jara*, he said:

> I cannot agree with the majority's assessment of the confusion, the despair, and the cynicism suffered by those who in intellectual isolation must stand by as their possessions and dignity are stripped from them by a Kafkaesque ritual deemed by the majority to constitute, nonetheless, a fair trial.[126]

b. *Right of Cross-Examination*

The vitiation of effective cross-examination brought about by the absence of an interpreter to assist a defendant has been repeatedly recognized by both federal and state courts in criminal adjudications. In *Negron* the Second Circuit clearly articulated this concern as an integral part of its rationale:

> However astute [the interpreter's] summaries may have been, they could not do service as a means by which Negron could understand the precise nature of

124. *See, e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) ("Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (citation omitted) this prejudgment garnishment procedure violates the fundamental principles of due process."); Schroeder v. New York, 371 U.S. 208 (1962); Covey v. Town of Somers, 351 U.S. 141 (1956); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

It should also be remembered that in some types of civil actions, such as suits for nonsupport, liberty interests as well as property interests may be at stake.

125. Throughout this article, analogies are drawn between the recognition of a right to an interpreter in criminal actions and the need for similar recognition of that right in civil proceedings. This analytical approach is not meant to suggest that parties must always be guaranteed identical procedural rights in criminal and civil adjudications. Clearly, the recognition of the procedural rights of parties in the two systems has received quite different treatment since the inception of our Constitution and throughout the development of our judicial system. Moreover, application of the due process balancing test in various criminal and civil actions may dictate that different procedures are warranted due to the particular interests of the state and the other parties involved in each action. Nevertheless, the analogy seems appropriate in the present context because the constitutional rights that form the nexus for recognition of a right to an interpreter in a criminal action—fundamental fairness, cross-examination, and the right of a party to be present at trial—guaranteed to criminal defendants by the fifth and sixth amendments, are also rights that have been constitutionally guaranteed to civil defendants through the due process clause. Therefore, the recognition that satisfaction of these rights in a criminal proceeding necessitates the appointment of an interpreter merits consideration in determining whether due process requires recognition of the right to an interpreter in a civil adjudication.

126. 21 Cal. 3d at 188, 578 P.2d at 98, 145 Cal. Rptr. at 851 (Tobriner, J., dissenting).

> the testimony against him during that period of the trial's progress when the state chose to bring it forth. Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination.[127]

Many of the state court decisions recognizing a right of a criminal defendant to the services of an interpreter also base this right upon a state and/or federal constitutional guarantee of the right of confrontation and cross-examination.[128] Typical of these decisions is *State v. Natividad*,[129] in which the Arizona Supreme Court expressed its concern in the following manner:

> The inability of a defendant to understand the proceedings would be not only fundamentally unfair but particularly inappropriate in a state where a significant minority of the population is burdened with the handicap of being unable to effectively communicate in our national language. A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his attorney's effectiveness, especially on cross-examination.[130]

Concern about the impairment of cross-examination in criminal adjudications is grounded in sixth avendment[131] and corresponding state constitutional guarantees. In civil adjudications the right to cross-examination finds its constitutional nexus in the due process clause. As discussed above,[132] the right of cross-examination has been repeatedly identified by the U.S. Supreme Court as a basic requisite of a due process hearing.[133] Recognition of the right of cross-examination as a fundamental due process safeguard is warranted by the fact that the same basic concerns that underlie the sixth amendment guarantee of cross-examination in criminal adjudications—fairness[134] and reliability of the fact-finding process[135]—are equally significant in civil adjudications. Effective cross-examination is no less hampered in a civil trial than in a criminal trial when an indigent defendant is unable to understand the testimony of witnesses

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127. 434 F.2d at 389-90. The First Circuit in Carrion v. United States, 488 F.2d at 14, similarly recognized that "the right to confront witnesses would be meaningless if the accused could not understand their testimony and the effectiveness of cross examination would be severely hampered."

128. *See* note 91 *supra*.

129. 111 Ariz. 191, 526 P.2d 730 (1974).

130. *Id.* at 194, 526 P.2d at 733.

131. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

132. *See* notes 21-26 and accompanying text *supra*.

133. Goldberg v. Kelly, 397 U.S. 254, 270 (1970). *See* Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963).

134. In United States *ex rel.* Negron v. New York, 434 F.2d at 389, the Second Circuit declared:

> It is axiomatic that the Sixth Amendment's guarantee of a right to be confronted with adverse witnesses, now also applicable to the states through the fourteenth amendment. (citations omitted) includes the right to cross-examine those witnesses as an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

(*quoting in part* Pointer v. Texas, 380 U.S. 400, 405 (1965)).

135 *See* Pointer v. Texas, 380 U.S. 400, 404 (1965).

or to communicate effectively with his attorney. For this reason, the determinations by federal and state courts that the sixth amendment guarantee of cross-examination dictates a corresponding constitutional right to an interpreter are persuasive precedent for the recognition of a constitutional right to the assistance of an interpreter for an indigent civil defendant predicated upon the requisites of procedural due process.[136]

c. *Right to Be Present*

Consideration of the relationship between the right to the assistance of an interpreter and the right to cross-examination has led some courts to consider the corresponding right of a party to be present at his trial and the infringement of that right by denial of an interpreter's services. In *Negron*, the Second Circuit incorporated the violation of the right to be present as part of its rationale:

> Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial, [Lewis v. United States, 146 U.S. 370 (1892)], unless by his conduct he waives that right. [Illinois v. Allen, 397 U.S. 351 (1968)] And it is equally imperative that every criminal defendant—if the right to be present is to have meaning—possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." [Dusky v. United States, 362 U.S. 402 (1962) (per curiam)] Otherwise, "[t]he adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object." Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1969).[137]

At least one state court has similarly recognized that failure to provide an interpreter to an indigent non-English-speaking defendant in a criminal action may infringe upon "the accused's basic 'right to be present in the courtroom at every stage of his trial.' "[138] The court noted that "[i]t would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy."[139]

It is generally recognized that the right to be present during trial is guaranteed to a party in a civil action as a requisite of procedural due process [140] Certainly, the underlying concerns that support such a right in

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136. Recognition of the right to an interpreter as a fundamental requisite of due process would not bestow upon this safeguard the status of an absolute guarantee that the right to an interpreter has attained (when necessity is demonstrated) in criminal adjudications, as a result of its derivation from the sixth amendment. Rather, it still would be subject to the interest balancing that determines in each particular case which due process safeguards will be afforded. *See* notes 8 and 25 *supra*.

137. 434 F.2d at 389 (citation and footnote omitted).

138. State v. Natividad, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974), *citing* Lewis v. United States, 146 U.S. 376 (1892).

139. 111 Ariz. at 194, 526 P.2d at 733.

140. *See* notes 27-37 and accompanying text *supra* for a discussion of the recognition of the right of a party to be present in a civil adjudication.

criminal proceedings—"fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice"—are equally significant in civil adjudications, especially those in which defendants may be subject to substantial liability. Therefore, those decisions that recognize the relationship between the right of a party to be present during a criminal proceeding and the consequent need for the services of an interpreter to preserve that right may appropriately be given weight in determining whether procedural due process requires the appointment of an interpreter in civil adjudications.

2. *A Balancing of Interests—Application of the Eldridge Formula*

Procedural due process is a fluid doctrine, prescribing general principles and recognizing certain fundamental safeguards, but providing that the identification of the procedural protections required in each particular case to afford a meaningful hearing will vary with the subject matter and competing interests in each situation.[141] As has been discussed,[142] in *Mathews v. Eldridge*,[143] the Supreme Court set forth a general formula integrating the factors traditionally considered by courts in balancing the interests of the individual and the state to determine the form of hearing required in each particular case. While there is controversy regarding whether the balancing test has become too utilitarian, thereby eroding the fundamental values upon which due process rests,[144] the *Eldridge* formula nevertheless represents the current approach of the courts in resolving the question of what process is due,[145] and thus merits attention in deciding whether the provision of an interpreter is a requisite of a meaningful hearing.

a. *Interests of the Civil Defendant*

The first factor propounded in the *Eldridge* formula is the private interest that will be affected by the official action.[146] Jara's case provides an excellent illustration of the significance of the interests of an indigent defendant in a civil adjudication. An unfavorable verdict could have imposed upon Jara a debt equal to one-fifth of his annual income of $6,360.00, which served to support six people. Although California's garnishment laws are fairly liberal in their protection of judgment debtors, loss of any portion of Jara's wages could subject him and his family to

141. *See* note 8 and accompanying text *supra*.

142. *See* notes 14-17 and accompanying text *supra*.

143. 424 U.S. 319, 334-35 (1976).

144. *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976). *See also* Pollack, *Natural Rights: Conflict and Consequences*, 27 OHIO ST. L.J. 559, 573-80 (1966).

145. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Ingraham v. Wright, 430 U.S. 651 (1977); Bounds v. Smith, 430 U.S. 817 (1977).

146. Mathews v. Eldridge, 424 U.S. at 334-35.

increased deprivation.[147] In addition, execution of the judgment could cause loss of personal property not exempt,[148] including his means of transportation to and from work,[149] or even cause him to lose his job.[150] Property Jara may acquire in the future is similarly subject to the threat of execution.[151] Property interests of other defendants may be more severely threatened by exposure to much larger judgments or to execution under garnishment and attachment statutes that do not provide the protections for indigents contained in the California statutes.[152] The significance of an indigent's interests in obtaining due process protections prior to garnishment was fully recognized by the Supreme Court in *Sniadich v. Family Finance Corp.*,[153] in which the Court commented:

> For a poor man—and whoever heard of the wage of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense of such a process?[154]

In addition to financial loss, defendants may be subject to stigmatization as a poor credit risk while occupying the status of a judgment debtor.

Beyond the financial interests of a civil defendant and his family, recognition must be given to the importance of treating a defendant with

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147. Without filing for an exemption, one-half of the debtor's earnings, or such greater portion as is allowed by federal statute, received for his personal services rendered at any time within 30 days next preceeding the date of a withholding by an employer served with a writ of execution, is automatically exempt from execution. CAL. CIV. PROC. CODE § 690.6 (West Supp. 1979).

> See *15 USCS 1673* [1976], which ordinarily raises such exemption to 75% of the debtor's earnings by providing that the maximum part of the aggregate disposable earnings of an individual for any work week that is subjected to garnishment may not exceed 25% of his disposable earnings for that week, or the amount by which his disposable earnings for that week exceeds 30 times the federal minimum hourly wage prescribed by *29 USCS 206(a)(1)* in effect at the time the earnings are payable, whichever is less."

30 CAL. JUR. 3d, *Enforcement of Judgments* § 33, at 59-60 n.26. In addition, all of the debtor's earnings received for personal services at any time within 30 days next preceeding the date of a withholding by the employer is exempt if necessary for the use of the debtor or the debtor's family residing in California and supported in whole or in part by the debtor, providing the debtor files for such exemptions and the judgment is not for certain debts incurred by the debtor or his family for common necessaries or for personal services rendered by a present or former employer of the debtor. CAL. CIV. PROC. CODE § 690.6 (West Supp. 1979).

148. 146 CAL. CIV. PROC. CODE § 682 (West Supp. 1979).

149. If an automobile owned by the debtor meets certain qualifications and its value exceeds the total of $500, the liens and encumbrances upon it and certain fees and costs, it may be subject to execution. CAL. CIV. PROC. CODE § 690.2 (West Supp. 1979).

150. An employee is only protected by California law from discharge by reason of the fact that his wages have been subject to garnishment to the extent of garnishment for the payment of one judgment. CAL. LAB. CODE § 2929 (West Supp. 1979).

151. CAL. CIV. PROC. CODE §§ 681, 685 (West Supp. 1979), provide that a victorious plaintiff can enforce a judgment at any time during the ten years after its entry and even beyond the ten year period through the use of supplemental pleadings.

152. *See, e.g.*, OHIO REV. CODE ANN. § 2329.62 (Page Supp. 1978).

153. 395 U.S. 337 (1969). *Sniadach* involved the issue of prejudgment garnishment without prior hearing or notice.

154. 395 U.S. at 342 n. 9, *quoting* Congressman Gonzales, 114 CONG. REC. 1833 (1968).

dignity and respect throughout the adjudication. The preservation of each party's dignity and self-respect during the judicial proceedings is one of the primary functions of procedural due process.[155] To force a person to sit in total incomprehension while others decide issues vitally important to the welfare of both the defendant and his family transforms a civil adjudication into a dehumanizing experience that should not be associated with the judicial system of a country aspiring to the ideals of justice and equality.[156]

b. *Reliability of the Fact-Finding Process*

The second factor identified in *Eldridge* as worthy of consideration is the risk that the procedures used will cause an erroneous deprivation of an individual's interests. The *Jara* majority appeared to find this risk minimal, since it repeatedly emphasized that defendant's counsel controls courtroom proceedings. Totally ignored were the risks of error created by the ineffective cross-examination that may result when a defendant is unable to comprehend the testimony of witnesses and alert his counsel to unexpected testimony.[157] Further potential for error exists when counsel and client themselves cannot communicate.[158] These handicaps to effective cross-examination and communication pose a serious threat to reliable fact-finding in civil adjudications.[159] The risk of error is enormously

155. *See* Mashaw, *supra* note 144, at 50. Professor Tribe observes that of the two alternative conceptions of the primary purpose of procedural due process, the first focuses on the concept of individual dignity:

> One approach begins with the proposition that there is *intrinsic* value in the due process right to be heard, since it grants to the individuals or groups against whom government decisions operate the chance to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. From this perspective, the hearing may be considered both as a "mode of politics," and as an expression of the rule of law, regarded here as the antithesis of power wielded without accountability to those on whom it focuses. Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." [Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)]. At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically insignificant, the very *essence* of justice.

TRIBE, *supra* note 11, at 502-03 (emphasis in original) (footnotes omitted).

156. *See* United States *ex rel.* Negron, 434 F.2d at 390; Jara v. Municipal Court, 21 Cal. 3d at 188, 578 P.2d at 98, 145 Cal. Rptr. at 851 (dissenting opinion).

157. *See* notes 127-36 and accompanying text *supra*.

158. *See* Safford, *No Comprendo: The Non-English Speaking Defendant and the Criminal Process*, 68 J. CRIM. L. & CRIMINOLOGY 15, 21-22 (1977).

159. *See* United States *ex rel.* Negron v. New York, 434 F.2d at 389; 5 WIGMORE ON EVIDENCE § 1367 (3d ed. 1940), *supra* note 22.

increased in cases in which indigent non-English-speaking defendants are not represented by counsel and effective cross-examination becomes impossible.

c. *Interests of the State*

The final factor to be considered according to the *Eldridge* formula is the government's interest, including the fiscal and administrative burdens that the additional procedural requirement would entail and the nature of the function involved.

Providing interpreters when needed to indigent civil defendants will be an added expense that the state must shoulder. The extent to which this expense may be offset by increased efficiency in courtroom proceedings is difficult to measure.[160] Nevertheless, any increased fiscal or administrative burdens that might result need not be excessive. Justice Tobriner suggested that a determination could be made by the judge prior to each trial regarding the need for an interpreter and the availability of qualified assistance from sources other than the court.[161] His suggestion is sound, and could be implemented at very little extra cost to the state if the determination was made during the regular course of pre-trial conferences. In California and other states with similar provisions, there already exists a judicial mechanism for providing qualified interpreters in criminal trials.[162] Expansion of these existing systems to provide for the needs of civil defendants would significantly diminish the administrative burden of providing qualified interpreters to indigent civil defendants.

Another aspect of the fiscal considerations is that willingness to rely solely upon social service agencies to provide qualified interpreters, as was suggested by the majority in *Jara*,[163] may be robbing Peter to pay Paul. Where such agencies are themselves partially or totally funded by government, such a system might cost the state more in the long run because of higher administrative costs resulting from decreased centralization.

The state's interests do not end with fiscal and administrative concerns. The strengthening of its judicial system, a vital component of any government, is itself an important objective.[164] Thus, the state has a

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160. *See* Supplemental Brief of Appellant, at 20, filed in the Supreme Court of California, L.A. No. 30,788, Jara v. Municipal Court, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978). Commentators have also suggested that interpreters might facilitate the conduct of judicial business since, in the absence of an interpreter, frequent recesses may be necessary to work out communication problems between the client and his attorney or the court. Chang & Araujo, *Interpreters for the Defense: Due Process for the Non-English Speaking Defendant*, 63 CAL. L. REV. 801, 811 (1975).

161. 21 Cal. 3d at 187-88, 578 P.2d at 97-98, 145 Cal. Rptr. at 850-51.

162. *See, e.g.*, CAL. GOV. CODE § 26806 (West 1968), § 68560 (West Supp. 1979); OHIO REV. CODE ANN. § 2335.09 (Page 1954).

163. 21 Cal. 3d at 184-86, 578 P.2d at 95-97, 145 Cal. Rptr. at 848-50.

164. In Boddie v. Connecticut, 401 U.S. at 374-75, the Court acknowledged the vital role played by the judicial system in society:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its

substantial interest in maintaining a judicial system that is perceived as fair and just by its citizens.[165] Even if only one segment of the population feels that its interests will not be protected, the safety and cohesion that a society receives from an organized judicial system is weakened. Furthermore, the mistrust created by a system perceived to be depriving even a minority of sufficient procedural protections will spread to other segments of the society, wary of the protection their interests will receive. Thus, even the interests of the state may not be best served in the long run by a decision to forego necessary procedural protections.

d. *A Balancing of Interests in* Jara

Although the California Supreme Court in *Jara* failed to make any systematic application of the *Eldridge* formula, one can perceive a balancing of those interests underlying the court's rationale. The majority, in a cursory examination of the due process issue, determined that Jara was not deprived access to the courts because alternative sources were available to provide the required procedural protection.[166] Such a decision was in effect a conclusion that the interests of the defendant and the reliability of the fact-finding process were not significantly impaired.

A major flaw in the majority's analysis was the assumption that such alternative sources for assistance exist and are readily available to Jara and other indigent defendants. The majority provided no factual support for this conclusion.[167] As the dissent points out, the postulates advanced in support of this contention may be faulty.[168] Nevertheless, even if the

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erection and enforcement of a system of rules defining various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly and predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. . . .

165. *See* Joint Anti-Fascist Committee v. McGrath, 341 U.S. at 172 & n.19 (Frankfurter, J., concurring).

166. 21 Cal. 3d at 186, 578 P.2d at 96-97, 145 Cal. Rptr. at 850.

167. *Id.* at 184-86, 578 P.2d at 95-97, 145 Cal. Rptr. at 848-50.

168. The majority speculates that a defendant could receive language assistance from his community or from private organizations that exist to aid immigrants. *Id.* Justice Tobriner in his dissent correctly points out that while such sources for assistance may be available, it is just as likely that they are not. 21 Cal. 3d at 188, 578 P.2d at 97-98, 145 Cal. Rptr. at 850-51 (Tobriner, J., dissenting). Members of defendant's community may be the least able to provide qualified interpretation of complex court proceedings. (Of the Spanish-speaking population of California, sixteen years of age or over, only 22% have graduated from high school. Appellant's Supplemental Brief in the Supreme Court of California, *supra* note 160, at 12, *citing* UNITED STATES BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: "EDUCATIONAL ATTAINMENT IN THE UNITED STATES, MARCH 1973-74" iv, n.39 (1974)). Tobriner notes that significant numbers of minority groups whose principal language is not English were neither born nor educated in this country. It is therefore quite possible that family, friends, and neighbors are not bilingual. Tobriner further recognized that non-English-speaking persons in this country tend to come from economically deprived communities. 21 Cal. 3d at 188, 578 P.2d at 98, 145 Cal. App. at 850. Taking off work for the length of a trial, or abandoning other necessary duties, such as child care, may not be feasible for family members or friends.

The majority supports its assumption that assistance is available from private organizations only by a citation to Guerrera v. Carlson, 9 Cal. 3d 808, 813, 512 P.2d 833, 836, 109 Cal. Rptr. 201, 204 (1973), in which the court took judicial notice of the fact that opportunities were available to obtain

majority was correct in assuming that many indigent defendants do have alternative means to obtain the assistance of a qualified interpreter throughout their trial, such a generalization does not protect the constitutional rights of those who do not. Individual inquiry in each case to determine the availability of such resources and court appointment of qualified interpreters when alternative sources are not available, is the only means to ensure that each indigent defendant will be provided with the necessary safeguards to constitute a meaningful hearing.[169]

Though the majority never addressed the state's interests, historical perspective suggests that fiscal economy was a major concern. The court's decision in *Jara* was handed down amid a growing popular revolt against higher taxes and government spending that climaxed a month later in the passage of a state constitutional amendment, Proposition 13.[170] The anticipated reduction in state revenue and the climate created by the intense debate over the amendment may have caused the majority to place inordinate weight upon fiscal concerns in reaching their decision.

B. *The Right to An Interpreter—An Equal Protection Analysis*

1. *The Existence of a Classification*

In order to determine whether the doctrine of equal protection is violated by the failure of the court to appoint interpreters to assist defendants in civil adjudications, one must first demonstrate the existence of a classification created by governmental action.[171] The requirement that all judicial proceedings be conducted in English, provided by statute in California,[172] establishes a basis for recognition of a classification. The effect of such a provision, combined with the failure to appoint interpreters, is to create a class of indigent civil defendants who can neither understand the proceedings in which they must defend their property nor afford to remedy their handicap. The California appellate court that decided *Jara* readily acknowledged the creation of this classification, observing that

> indigent defendants in a civil case who speak and understand English can understand the oral proceedings against them and, hence, are not denied *a meaningful opportunity to be heard and defend*, while an indigent defendant

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translations of welfare termination notices. The availability of such a service is obviously no guarantee that a social service organization could similarly provide interpreters qualified to translate court proceedings where the time required may be extensive. The resource allocation of such a commitment far exceeds the services envisioned by the court in *Guerrera*.

169. The *Jara* majority also implied that the reliability of the fact-finding process is preserved because the court proceedings are controlled by counsel. This argument is addressed above in notes 116-18 and accompanying text *supra*.

170. Proposition 13, which added Art. XIII(A) to the California Constitution, was proposed by Initiative Measure, 1978, and approved by the voters at the primary election held June 6, 1978. The amendment drastically lowered real property taxes and severely restricted the ability of the state legislature to raise state taxes in the future.

171. *See* note 63 *supra*.

172. CAL. CIV. PROC. CODE § 185 (West 1954).

who does not speak or understand English and is not provided with an interpreter is denied such an opportunity.[173]

2. *Review Under Strict Scrutiny*

Once a classification is established, it must be subjected to the appropriate standard of review to determine whether the doctrine of equal protection has been violated.[174] The application of the rational relationship test will not sustain a finding that indigent civil defendants have been denied equal protection, since the state can easily demonstrate a legitimate state interest that bears a rational relationship to the denial of interpreters.[175] For example, fiscal economy and promotion of a unified language system are both legitimate objectives that are rationally related to the refusal to provide language assistance at state expense in a court system conducted solely in English. Therefore, to establish that this classification violates the right of indigent non-English-speaking defendants to equal protection, it is necessary to show that the strict scrutiny test is the appropriate standard of review.[176]

As discussed above,[177] strict scrutiny is invoked in two instances, one of which is to review classifications that discriminate against a suspect group. Although non-English-speaking persons have not been identified as a suspect group, classifications that discriminate against this group effectively discriminate on the suspect grounds of race and national origin.[178] Some support for invoking strict scrutiny on this basis may be derived from the decision of the Supreme Court in *Lau v. Nichols*,[179] in which the Court held that section 601 of the Civil Rights Act of 1964,[180] which bans discrimination "on the ground of race, color, or national origin" in programs receiving federal financial assistance, was violated by the failure of the San Francisco school system to provide English language instruction or other adequate instructional procedures to 1800 students of

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173. 137 Cal. Rptr. at 541 (1977) (emphasis in original).

174. *See* note 64 and accompanying text *supra*.

175. *See* notes 65-66 and accompanying text *supra*.

176. When there is no fundamental right or suspect class involved, the Court to date has been willing to invoke a standard higher than the rational relationship test only in cases involving gender or illegitimacy. *See* note 64 *supra*. The decisions of the Supreme Court applying an intermediate standard of review as yet provide no general formula to determine when this test is appropriate. Since there is no indication that this standard would be employed to evaluate the type of language discrimination examined herein, this article will not analyze the denial of interpreters according to the criteria of the intermediate test. The arguments in such an analysis, however, would parallel those set forth below in the discussion of the application of the strict scrutiny test. Whether the interests set forth by the state would be deemed *important* government objectives, the achievement of which are *substantially* related to the denial of interpreters, is difficult to predict.

177. *See* notes 68-69 and accompanying text *supra*.

178. Certainly, logic would dictate that the vast majority of non-English-speaking persons in this country are either foreign born or children of foreign born parents and a large percentage are members of racial minorities. *See* Chang & Araujo, *supra* note 117, at 808.

179. 414 U.S. 563 (1974).

180. 42 U.S.C. § 2000d (1976).

Chinese ancestry who did not speak English.[181] This line of analysis, however, may be thwarted by recent Supreme Court decisions holding that governmental action will not be held unconstitutional solely because it has a racially disproportionate impact. Proof of racially discriminatory intent or purpose is now required to establish a violation of the equal protection clause.[182] Such a task would be difficult, if not impossible, in cases challenging the denial of interpreters in civil actions.[183]

Strict scrutiny is also mandated when a classification impinges upon a fundamental right.[184] Thus, another basis for the assertion of an equal protection right to an interpreter is to establish that the due process right to a meaningful hearing is a fundamental right in the context of an equal protection analysis. The United States Supreme Court has not yet recognized those procedural protections guaranteed by the due process clause in civil adjudications as fundamental rights that invoke strict scrutiny.[185] The California Supreme Court, however, in *Payne v. Superior*

181. The fact that the Supreme Court included language discrimination under discrimination based on race, color, or national origin prohibited by § 601 of the Civil Rights Act of 1964, an act intended to implement the fourteenth amendment, is certainly evidence that language discrimination may be viewed by the Court as creating suspect classifications on the basis of race and national origin. Chang & Araujo, *supra* note 117, at 808. Two aspects of the case, however, weaken the analogy in some respects. The Court in *Lau* specifically refused to reach the equal protection argument advanced in the case. 414 U.S. at 566. *See* Chang & Araujo, *supra* note 117, at 809, for discussion of this omission. Secondly, the Court in *Lau* relies heavily on regulations and guidelines issued by the Department of Health, Education, and Welfare [HEW] implementing the Act that require school systems to rectify language deficiencies of their students. While the position of HEW that language discrimination must be regulated to implement the Act is useful support for the policy advocated herein, the enforcement of the regulations in *Lau* provided the Court with a clear basis for its decision that obviated the need to directly address the question whether a language classiffcation constitutes a suspect racial and/or national origin classification.

182. Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 239-45 (1976). While both of these cases deal with racial discrimination, there is no indication that this line of analysis would not be equally applicable to classifications based on national origin.

183. *But cf.* Castro v. State, 2 Cal. 3d 223, 230-31, 466 P.2d 244, 248-49, 85 Cal. Rptr. 20, 24-25 (1970) (court recites history of prejudice and hatred that influenced passage of English literacy requirements for voting).

184. *See* note 69 and accompanying text *supra*.

185. *See* note 73 and accompanying text *supra*. In United States v. Kras, 409 U.S. 434 (1973), and Ortwein v. Schwab, 410 U.S. 656 (1973), cases involving both equal protection and procedural due process claims, the Court determined that the imposition of a filing fee in bankruptcy actions and state appellate actions did not violate a fundamental right guaranteed by the due process clause. As no other fundamental interests were infringed, and the imposition of the fees did not involve a suspect class, the Court determined in both cases that the legislation was in the area of social and economic regulation and should be reviewed under the rational relationship test. In Boddie v. Connecticut, 401 U.S. 371 (1971), where fundamental procedural due process rights were recognized in a civil context, the case was decided on due process grounds alone.

TRIBE, *supra* note 11, at 1111, explains Harlan's preference for due process analysis in *Boddie* over an equal protection analysis on the basis of a perceived absence of a natural limiting principle in the equal protection doctrine which focuses on differential treatment of the poor as a class and a fear that judicial intervention to redress poverty on the basis of equal protection could become wholesale or unprincipled. Due process analysis is perceived to be better suited to a case-by-case inquiry into the nature of the particular benefit sought and the circumstances of the particular indigent plaintiff.

The ability to guarantee a right under the due process clause alone, as the Court did in *Boddie*, suggests that one reason for the absence of Supreme Court opinions applying equal protection analysis to procedural rights guaranteed by the due process clause is the lack of necessity for and redundancy of such an approach.

Court of Los Angeles County,[186] has itself recently recognized that the due process right to be heard in court to defend one's property is a right of fundamental constitutional dimension, invoking strict scrutiny when it is denied. In *San Antonio School District v. Rodriguez,*[187] the United States Supreme Court determined that a right is deemed fundamental for purposes of equal protection analysis if it is guaranteed, implicitly or explicitly, by the Constitution. Thus, the fact that the right to a meaningful hearing to defend one's property interest has long been recognized as guaranteed by the Constitution[188] supports the ruling of the California court in *Payne.*

A successful invocation of the strict scrutiny test will also require proof that the exercise of the fundamental right has been significantly impaired.[189] Thus, an equal protection analysis of the right to an interpreter is inextricably intertwined with the recognition of a right to an interpreter as a fundamental guarantee of procedural due process.[190] It is necessary to establish that the due process right to a meaningful hearing includes the right of indigent civil defendants to the assistance of an interpreter before one can assert that this fundamental right has been impaired. In *Jara* the majority opinion failed to recognize a due process right to an interpreter and thus did not even address the equal protection issue.[191] Both the dissent[192] and the appellate court,[193] however, did find that the due process right of access was abridged by the failure of the state to provide Jara with an interpreter. As a result of this first finding, both[194]

186. 17 Cal. 3d 908, 919, 553 P.2d 565, 573, 132 Cal. Rptr. 405, 413 (1976). *See* note 77 and accompanying text *supra.*

187. 411 U.S. 1, 33 (1973).

188. *See* Boddie v. Connecticut, 401 U.S. 371, 377 & n.3 (1971).

189. *See* notes 78-81 and accompanying text *supra.*

As discussed above, note 81 and accompanying text *supra,* one explanation for the California Supreme Court's decision in Castro v. State to review the failure to adopt a bilingual electoral apparatus under a less strict standard may be a determination on its part that the right to vote would not be significantly infringed by the absence of such a system. The court observed that voters could prepare themselves to vote through advance study of sample ballots and the Spanish news media. The absence of an interpreter, however, is not subject to a similar determination, for it cannot be easily remedied by advance study or other substitute services. *See* notes 167-69 and accompanying text *supra.*

190. The relationship between the due process and equal protection claims illustrated here suggests conceptual difficulties that may arise in recognizing due process protections, which are determined according to the interests involved in each case, as fundamental rights for the purposes of equal protection analysis, which focuses on broad classifications. A resolution of all the issues which affect the general recognition of due process safeguards as fundamental rights, however, is beyond the scope of this article.

191. Though the majority gives no explanation for its refusal to address the equal protection issue, the most plausible reason for this omission lies in the fact that the majority's holding that the defendant was not denied meaningful access to the courts strips the equal protection argument of its doctrinal underpinning, a fundamental right that would invoke strict scrutiny.

192. 21 Cal. 3d at 193-94, 578 P.2d at 101, 145 Cal. Rptr. at 854.

193. 137 Cal. Rptr. at 541 (App. 1977).

194. Justice Tobriner, in his dissenting opinion, did not make specific reference to equal protection but rather alluded to it by stating that Jara was denied a fundamental right equal to the fundamental right denied in Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20(1970), a case decided on equal protection grounds.

concluded that denial of an interpreter effectively denied Jara his fundamental right to a fair and meaningful hearing and thus also constituted a violation of equal protection.[195]

Once it has been determined that strict scrutiny is the appropriate standard of review, the government must demonstrate that the classification is necessary to promote a compelling governmental interest.[196] In *Jara* the state asserted three "compelling" state interests: (1) maintaining a single language system; (2) discouraging frivolous litigation by imposing costs on all litigants; and (3) holding the maintenance of the courts within reasonable monetary limits.[197]

The appellate court found that while the state's interest in maintaining a single language system of English in court proceedings is significant, a denial of interpreters to indigent defendants was not necessary to promote that result. The court held that this interest would not be "compromised, endangered, disturbed or dented to any appreciable degree by the public expense involved in providing interpreters in civil actions to indigent defendants who do not understand or speak English."[198] No argument was presented that non-English-speaking defendants who can afford their own interpreters compromise the state's interest in maintaining a single language system in court proceedings. Thus, it is hard to imagine that affording indigent defendants that same privilege would significantly impair this interest. The state in *Jara* also implied in a brief that denial of an interpreter would provide non-English-speaking persons incentive to learn English.[199] Such an argument is unrealistic. It is highly improbable

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195. Professor Charles Thompson of the Ohio State University College of Law suggests that another fundamental right arguably infringed by the denial of interpreters is the right to petition the government for the redress of grievances, explicitly guaranteed by the first amendment. The Supreme Court has recognized that the right to petition extends to all departments of the government and thus includes the right of access to the courts. Cruz v. Beto, 405 U.S. 319, 321 (1972); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

Although the first amendment right to petition the courts has not yet been dealt with by the Supreme Court as a fundamental right in the context of an equal protection analysis, this may be due to the fact that first amendment rights are adequately protected by the substantive guarantees of the first amendment itself, rendering equal protection analysis extraneous. NOWAK, *supra* note 16, at 675. The basic right to petition, however, has been acknowledged as a fundamental right. DeJonge v. Oregon, 299 U.S. 353, 364-65 (1937) (a substantive due process analysis). The Supreme Court has further laid the groundwork for an equal protection analysis by holding that classifications affecting first amendment interests must be reviewed under strict scrutiny. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 99, 101-02 (1972). The more difficult issue is whether denial of an interpreter significantly impairs the right to petition. As it appears that no guidelines have yet been set to determine the procedural requisites of the first amendment right to petition the courts, it seems likely that such an analysis would either parallel the determination of a due process right to access or require only an absolute right to access in its barest form. Should the right to petition be held to require procedures necessary for a due process right to access, the equal protection claim to an interpreter would be stronger, since the Supreme Court has already acknowledged that strict scrutiny will be invoked to protect first amendment interests, a protection it has not yet recognized for procedural due process rights.

196. *See* note 67 and accompanying text *supra*.

197. 137 Cal. Rptr. at 541.

198. *Id.*

199. Respondent's Brief in the Court of Appeal, Second Appellate District, 2nd Civil No. 49245, at 10, Jara v. Municipal Court, 137 Cal. Rptr. 533 (App. 1977)

that an indigent person who does not speak English will attempt to learn English on the chance that he might one day be named defendant in a civil suit, or that, once named, he will have enough time to become sufficiently fluent in the language.[200]

The state's second compelling interest, discouraging frivolous litigation, is specious in the context of civil defendants who are compelled to become involved in the judicial process. The appellate court in *Jara* rejected this argument out of hand.[201] Moreover, in *Boddie* the United States Supreme Court recognized that such a concern is insufficient even to deter a plaintiff's right of access:

> [T]here [is] no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit. . . . Moreover, other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous litigation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few.[202]

The third interest asserted by the court is one of fiscal economy. As discussed above,[203] the cost of providing interpreters to indigent civil defendants, when the need is shown, is difficult to estimate. The appellate court reviewing *Jara* felt that the cost would be minimal, stating: "We seriously question the view that the cost of maintaining the court system will be increased to any appreciable degree if interpreters are provided at public expense in the limited situation presented in the case at bench."[204] Moreover, the burden is on the state to show the existence of a compelling state interest.[205] If the cost of interpreters is unknown, it is the state that has failed to meet its burden. In any event, the U.S. Supreme Court in

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200. *See* Chang & Araujo, *supra* note 117, at 810.

But cf. Castro v. State, 2 Cal. 3d 223, 242, 466 P.2d 244, 258, 85 Cal. Rptr. 20, 34 (1970), in which the court determined that the "state interest in maintaining a single language system is substantial" and that the provision of ballots, notices, and pamphlets in Spanish was not necessary because adequate alternatives existed for Spanish speaking persons to obtain this information. This decision can be distinguished from *Jara* on the grounds that alternative methods to obtain the needed service existed in *Castro*, whereas no such showing was made in *Jara*. Because such alternatives existed, it does not appear that the question of provision of Spanish ballots, etc., in *Castro* was subjected to the standard of strict scrutiny. No finding was made that the interest of maintaining a single language system was compelling or that denial of the Spanish ballots, etc., was necessary to promote that interest. *See also* Guerrero v. Carlson, 9 Cal. 3d 808, 814-16, 512 P.2d 833, 837-838, 109 Cal. Rptr. 201, 205-06 (1973), in which the Court followed *Castro*, denying an equal protection claim based on failure to translate welfare notices. Here again, there was no application of the strict scrutiny standard and alternative sources to obtain the service were held to be available.

201. 137 Cal. Rptr. at 541.

202. 401 U.S. at 381-82.

The state tried to resurrect this argument in its Supplemental Brief in the Supreme Court, at 9 L.A. No. 30, 788, Jara v. Municipal Court, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), by stating that a favorable decision would lay the groundwork for successful claims to public-funded counsel, experts and transcripts, which would increase frivolous litigation. Should the courts be willing in the future to recognize such services as fundamental rights, the *Boddie* rationale would be equally applicable in these cases.

203. *See* note 160 and accompanying text *supra*.

204. 137 Cal. Rptr. at 541-42.

205. *See* note 67 and accompanying text *supra*.

Shapiro v. Thompson[206] held that financial savings cannot justify an otherwise invidious classification challenged under the doctrine of equal protection.[207] Thus, none of the interests asserted by the state in *Jara* are sufficient to pass constitutional muster under the strict scrutiny standard of review.

V. CONCLUSION

The application of traditional modes of due process analysis demonstrates that an indigent, non-English-speaking defendant's right of access in a civil adjudication includes the right to the assistance of a qualified interpreter, appointed, if necessary, at state expense, to afford defendant a meaningful opportunity to be heard. The concept of fundamental fairness, pivotal to any due process analysis, has been recognized by courts in the context of both civil and criminal proceedings to compel the provision of an interpreter to indigent defendants, when need is demonstrated and adequate alternative sources of qualified assistance appear unavailable. Preservation of fundamental procedural protections—the right to cross-examination and the right of a party to be present throughout his trial—further dictates that an interpreter be provided. Finally, application of the balancing test traditionally employed to determine what process is due in each case demonstrates that the exposure of the civil defendant and the defendant's family to potentially severe deprivation, the preservation of the defendant's dignity, the reliability of the fact-finding process, and the state's interest in maintaining the public's respect for and compliance with the judicial system outweigh any fiscal or administrative burdens which may be imposed. Had the California Supreme Court in *Jara* examined the issue in terms of traditional due process concerns and safeguards, or systematically applied the balancing test prescribed in *Eldridge*, each such mode of analysis would have indicated that Jara was entitled to receive the assistance of a qualified interpreter throughout his trial, appointed at state expense if a hearing disclosed that adequate alternative sources were unavailable.

The recognition of the right of an indigent civil defendant to a court-appointed interpreter as a requirement of equal protection finds less support in current doctrinal analysis. The lack of proof of discriminatory intent is likely to deflate an argument focused on discrimination against a suspect group. Therefore, a successful equal protection claim would most probably result from the application of the strict scrutiny standard of review invoked by infringement of a fundamental right. Since the United States Supreme Court has not yet recognized those procedural protections guaranteed by the due process clause in civil adjudications as fundamental

206. 394 U.S. 618, 633 (1969).

207. *See* Payne v. Superior Court of Los Angeles County, 17 Cal. 3d at 920, 553 P.2d at 574, 132 Cal. Rptr. at 414.

rights for purposes of equal protection analysis, a decision that denial of the due process right to access invokes strict scrutiny would require an extension of current equal protection doctrine. In California, however, such an extension was not required, since the California Supreme Court had already recognized that the due process right to a meaningful hearing was of fundamental constitutional dimension, invoking strict scrutiny when it is denied. Once this hurdle is overcome, recognition that the due process right to a meaningful hearing includes the right of indigent civil defendants to the assistance of an interpreter dictates that strict scrutiny be applied. The application of the strict scrutiny standard poses no threat to a defendant's equal protection claim, for the criteria are difficult for the government to meet. None of the interests asserted by the state in *Jara* were sufficient to survive review under this standard.[208]

Despite the deficiencies in current equal protection analysis in supporting a right to an interpreter in a civil trial, it is obvious that the policy behind the equal protection doctrine would be well-served by guaranteeing indigent, non-English-speaking defendants such a right. The promise that "people of different circumstances will not be treated by the government as if they were the same"[209] can only be kept when indigent non-English-speaking defendants are guaranteed the assistance of interpreters to afford them the same opportunity that other defendants have to comprehend and participate fully in the defense of their interests in a civil proceeding.

Marianne Brower Blair

208. 137 Cal. Rptr. at 541-42.

209. *See* note 62 and accompanying text *supra*.